

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID S. MEDINA and STEVEN MEDINA,

Plaintiffs,

v.

EMC MORTGAGE CORP.; ONEWEST BANK,
FSB; and CITIBANK, N.A.,

Defendants.

No. 09-04830 CW

ORDER GRANTING
DEFENDANTS'
MOTIONS TO
DISMISS
PLAINTIFFS' FIRST
AMENDED COMPLAINT

Plaintiffs David Medina and Steven Medina bring state and federal claims against Defendants EMC Mortgage Corporation, Citibank and OneWest Bank for their alleged conduct related to a loan Plaintiffs obtained. EMC and Citibank filed a joint motion to dismiss Plaintiffs' First Amended Complaint (1AC) and OneWest filed a separate motion to dismiss. Plaintiffs oppose the motions. The motions were taken under submission on the papers. Having considered all of the papers filed by the parties, the Court grants Defendants' motions.

BACKGROUND

The following facts are taken from Plaintiffs' 1AC, the documents recorded in the Contra Costa County Recorder's Office, of

1 which the Court takes judicial notice, and certain documents
2 Plaintiffs rely upon in their complaint, the authenticity of which
3 has not been questioned. In May, 2007, Plaintiffs obtained a loan
4 for \$486,400 from American Home Mortgage Acceptance, Inc., secured
5 by property located at 1726 Fairhaven Court, Oakley, California.
6 The deed of trust identifies American Home Mortgage Acceptance,
7 Inc. as the lender, New Century Title as the trustee and Mortgage
8 Electronic Registration Systems, Inc. as the beneficiary. Also, in
9 May, 2007, Plaintiffs obtained a second loan for \$36,000, secured
10 by the same property. The second loan identifies IndyMac Bank,
11 F.S.B. as the lender and Commonwealth Land Title Insurance Company
12 as the trustee.

13 A notice of default in connection with the first loan was
14 recorded on September 14, 2009 with the Contra Costa County
15 Recorder's Office. As of September 11, 2009, the amount in arrears
16 was \$24,009.34. On October 21, 2009 Cal-Western Reconveyance
17 Corporation was substituted as trustee on the first loan and on
18 November 4, 2009, an assignment of the deed of trust in connection
19 with the first loan was recorded, which assigned all interest under
20 the deed to Citibank. A notice of trustee's sale in connection
21 with the first deed of trust was recorded on December 22, 2009.

22 LEGAL STANDARD

23 A complaint must contain a "short and plain statement of the
24 claim showing that the pleader is entitled to relief." Fed. R.
25 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a
26 claim is appropriate only when the complaint does not give the
27 defendant fair notice of a legally cognizable claim and the grounds
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1 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
2 (2007). In considering whether the complaint is sufficient to
3 state a claim, the court will take all material allegations as true
4 and construe them in the light most favorable to the plaintiff. NL
5 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).
6 However, this principle is inapplicable to legal conclusions;
7 "threadbare recitals of the elements of a cause of action,
8 supported by mere conclusory statements," are not taken as true.
9 Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009)
10 (citing Twombly, 550 U.S. at 555).

11 Generally, a district court, in ruling on a Rule 12(b)(6)
12 motion, may not consider any material beyond the complaint. See
13 Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542,
14 1555 n. 19 (9th Cir. 1990). Documents whose contents are alleged
15 in the complaint, and whose authenticity no party questions, but
16 which are not physically attached to the pleading, may be
17 considered. See Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir.
18 1994). In addition, a district court may consider any document
19 "the authenticity of which is not contested, and upon which the
20 plaintiff's complaint necessarily relies," regardless of whether
21 the complaint refers to the document. See Parrino v. FHP, Inc.,
22 146 F.3d 699, 706 (9th Cir. 1998). The Court may also consider
23 matters that are subject to judicial notice. See Mack v. South Bay
24 Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).

DISCUSSION

I. Truth In Lending Act (TILA)

The only parties who can be liable for TILA violations are the

1 original creditor and assignees of that creditor. 15 U.S.C.
2 §§ 1640, 1641. Servicers of consumer obligations are not treated
3 as assignees for purposes of imposing liability unless they are
4 also the owner of the obligation. 15 U.S.C. § 1641(f); see Chow v.
5 Aegis Mortg. Corp., 286 F. Supp. 2d 956, 959 (N.D. Ill. 2003).

6 Here, American Home Mortgage Acceptance was the original
7 lender of the first loan, EMC is the loan servicer and Citibank is
8 the trustee. Because EMC and Citibank were not the original lender
9 of the first loan and are not alleged to have been assigned any
10 beneficiary interest under the loan, they are not proper parties to
11 a TILA action. OneWest, a federally chartered savings bank
12 established on March 19, 2009, was not even in existence at the
13 time of the loan's origination, in May, 2007. Absent an alleged
14 unity between American Home Mortgage Acceptance and OneWest, none
15 of Plaintiffs' allegations against American Home Mortgage
16 Acceptance support a cause of action against OneWest.

17 Moreover, Defendants cannot be liable for damages because the
18 one-year statute of limitations has expired. 15 U.S.C. § 1640(e).
19 Plaintiffs executed their first loan on May 14, 2007 but they filed
20 their lawsuit in October, 2009. Thus, the claim for damages is
21 untimely.

22 Further, Plaintiffs' claim for rescission fails because they
23 have not adequately alleged the present ability to tender amounts
24 owed under the first loan. Rescission under TILA "should be
25 conditioned on repayment of the amounts advanced by the lender."
26 Yamamoto v. Bank of New York, 329 F.3d 1167, 1171 (9th Cir. 2003)
27 (emphasis in original) (citing LaGrone v. Johnson, 534 F.2d 1360,
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1 1362 (9th Cir. 1976); see Garza v. Am. Home Mortgage, 2009 WL
2 188604 (E.D. Cal.) (stating that "rescission is an empty remedy
3 without [the borrower's] ability to pay back what she has
4 received"); Martinez v. EMC Mortgage Corp., 2009 WL 2043013 *6
5 (E.D. Cal.) (noting "absent meaningful tender, TILA rescission is
6 an empty remedy, not capable of being granted"); Carnero v. Weaver,
7 2009 WL 5114268 (N.D. Cal.). Plaintiffs allege that they are
8 "prepared to tender from a refinance, assistance by a family member
9 and from funds from savings once the amount to tender is known."
10 1AC ¶ 68. A very similar allegation regarding tender was deemed
11 insufficient in Lal v. American Home Servicing, Inc., 680 F. Supp.
12 2d 1218 (E.D. Cal. 2010) (finding tender insufficient where
13 plaintiff alleged that she was "prepared to tender from a
14 refinance, funds from savings, and assistance by family members
15 once the amount to tender is known, considering damages, and after
16 [defendant] stops reporting the loan negatively."). Plaintiffs'
17 tender offer is conditionally premised on securing refinancing and
18 obtaining assistance by family members. Such a conditional offer
19 of tender is inadequate. Plaintiffs allege that Defendants'
20 negative credit reporting has prevented their ability to refinance,
21 and that once they are successful in this action, and their credit
22 report is corrected, they will have the credit necessary to secure
23 refinancing. This sequence of events is too tenuous to assure this
24 Court that the borrowers will be able to meet their obligations.
25 Plaintiffs have not sufficiently alleged tender of their loan
26 proceeds.

27 For all of the reasons above, the Court grants Defendants'
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1 motions to dismiss the TILA claims against them.

2 II. Real Estate Settlement Procedures Act (RESPA)

3 Plaintiffs claim that EMC and Citibank failed to respond
4 properly to a qualified written request. 12 U.S.C. § 2605(a) ("If
5 any servicer of a federally related mortgage loan receives a
6 qualified written request from the borrower . . . the servicer
7 shall provide a written response acknowledging receipt of the
8 correspondence" A servicer is defined as "the person
9 responsible for servicing the loan." 12 U.S.C. § 2605(I)(2).

10 Plaintiffs' RESPA claim against Citibank fails because
11 Citibank is not alleged to be a servicer of any loan in this
12 action. Plaintiffs' RESPA claim against EMC fails for a different
13 reason. Plaintiffs contend that EMC's response to the qualified
14 written response was "improper" because it "failed to provide all
15 the relevant answers needed such as the name of the true owner of
16 the obligation." 1AC ¶ 186. However, Plaintiffs have not alleged
17 that it suffered any harm from EMC's "improper" response. Without
18 any allegations of damages from EMC's action, Plaintiffs' RESPA
19 claim fails. Singh v. Washington Mutual Bank, 2009 WL 2588885
20 (N.D. Cal.). Accordingly, the Court dismisses Plaintiffs' RESPA
21 claims against Citibank and EMC.

22 III. Rosenthal Fair Debt Collection Practices Act (RFDCPA)

23 Plaintiffs assert that EMC and Citibank violated the RFDCPA by
24 repeatedly contacting Plaintiffs in an attempt to collect on the
25 unpaid loan. The RFDCPA precludes a debt collector from collecting
26 or attempting to collect from a debtor on a consumer debt in a
27 threatening or harassing manner. See, Cal. Civ. Code § 1788, et

1 seq. Plaintiffs have failed to allege that EMC or Citibank is a
2 "debt collector" within the meaning of the RFDCPA. See Cal. Civ.
3 Code § 1788.2(c) (defining "debt collector" as "any person who, in
4 the ordinary course of business, regularly, on behalf of himself or
5 herself or others, engages in debt collection"). "[F]oreclosing on
6 [a] property pursuant to a deed of trust is not the collection of a
7 debt withing the meaning of the FDCPA." Izenberg v. ETS Servs.,
8 LLC, 589 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008). Nor does a
9 mortgage qualify as a "debt" under the RFDCPA. See Cal. Civ. Code
10 § 1788.2(e)-(f); Pittman v. Barclays Capital Real Estate, Inc. 2009
11 WL 1108889, at *3 (S.D. Cal. 2009); Inex v. Countrywide Home Loans,
12 Inc., 2008 WL 4791863, at *3 (S.D. Cal. 2008); Castaneda v. Saxon
13 Mortg. Services, Inc., 2009 WL 4640673, at *3 (E.D. Cal.).

14 Therefore, the Court dismisses this claim against EMC and Citibank.

15 IV. Unfair Business Practices

16 Plaintiffs assert an Unfair Business Practices claim against
17 all Defendants. California's Unfair Competition Law (UCL)
18 prohibits any "unlawful, unfair or fraudulent business act or
19 practice." Cal. Bus. & Prof. Code § 17200. The UCL incorporates
20 other laws and treats violations of those laws as unlawful business
21 practices independently actionable under state law. Chabner v.
22 United Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000).
23 Violation of almost any federal, state or local law may serve as
24 the basis for a UCL claim. Saunders v. Superior Court, 27 Cal.
25 App. 4th 832, 838-39 (1994). In addition, a business practice may
26 be "unfair or fraudulent in violation of the UCL even if the
27 practice does not violate any law." Olszewski v. Scripps Health,

1 30 Cal. 4th 798, 827 (2003).

2 Plaintiffs do not have standing to assert a claim under
3 section 17200. An individual bringing a claim under this section
4 must have suffered an injury and have lost money or property as a
5 result of unfair competition. Cal. Bus. & Prof. Code § 17204.
6 Plaintiffs have failed to allege that they have suffered any loss
7 as a result of Defendants' purported unfair business practices.
8 Further, Plaintiffs' section 17200 claim fails because none of
9 their other causes of action, which serve as predicate violations
10 under section 17200, states a valid claim.¹

11 V. Slander of Credit

12 Plaintiffs allege a slander claim against all Defendants.
13 They allege that Defendants caused false statements to be published
14 by various credit reporting agencies. The Fair Credit Reporting
15 Act preempts claims of defamation against a person who furnishes
16 information to a consumer reporting agency unless the false
17 information is furnished with malice or willful intent to injure a
18 consumer. 15 U.S.C. § 1681h(e). Plaintiffs have not alleged that
19 Defendants furnished false information to a consumer reporting
20 agency with malice or a willful intent to injure Plaintiffs. Even
21 if Plaintiffs' claim for slander were not preempted, Plaintiffs
22 have failed to allege how the conduct of each Defendant satisfies

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24 ¹OneWest generally argues that Plaintiffs' section 17200 claim
25 is preempted by federal law. Although the Home Owners Loan Act
26 (HOLA) and the Office of Thrift Supervision (OTS) may preclude
27 certain UCL claims, such as those that plead the UCL as a state law
imposing requirements concerning loan-related fees and disclosure
and advertising, see Silvas v. E*Trade Mortgage Corp., 514 F.3d
1001, 1006 (9th Cir. 2008), the UCL is not preempted in its
entirety, see id. at 1008.

1 the elements of a slander claim. Accordingly, the Court dismisses
2 this claim against Defendants.

3 VI. Wrongful Foreclosure

4 Plaintiffs allege a wrongful foreclosure claim against EMC and
5 Citibank. A plaintiff seeking to set aside a foreclosure sale must
6 first allege tender of the amount of the secured indebtedness.

7 Abdallah v. United Savings Bank, 43 Cal. App. 4th 1101, 1109 (1996)
8 (citing FPCI RE-HAB 01 v. E & G Investments, Ltd., 207 Cal. App. 3d
9 1018, 1021-22 (1989)); Smith v. Wachovia, 2009 WL 1948829, at *3
10 (N.D. Cal.). Without pleading tender or the ability to offer
11 tender, a plaintiff cannot seek to set aside a foreclosure sale.
12 Karlsen v. Am. Savings & Loan Ass'n, 15 Cal. App. 3d 112, 117
13 (citing Copsey v. Sacramento Bank, 133 Cal. 659, 662 (1901));
14 Smith, 2009 WL 1948829, at *3 (citing Karlsen). As noted above,
15 Plaintiffs have not adequately alleged their tender or their
16 ability to offer tender. Therefore, the Court dismisses this
17 claim.

18 VII. Negligence

19 A cause of action for negligence must allege (1) the
20 defendant's legal duty of care to the plaintiff; (2) the
21 defendant's breach of duty; (3) injury to the plaintiff as a result
22 of the breach; and (4) damage to the plaintiff. Hoyem v. Manhattan
23 Beach City Sch. Dist., 22 Cal. 3d 508, 513 (1978). "The legal duty
24 of care may be of two general types: (a) the duty of a person to
25 use ordinary care in activities from which harm might reasonably be
26 anticipated, or (b) an affirmative duty where the person occupies a
27 particular relationship to others." McGettigan v. Bay Area Rapid

1 Transit Dist., 57 Cal. App. 4th 1011, 1016-17 (1997).

2 "[A]s a general rule, a financial institution owes no duty of
3 care to a borrower when the institution's involvement in the loan
4 transaction does not exceed the scope of its conventional role as a
5 mere lender of money." Nymark v. Heart Fed. Savings & Loan Ass'n,
6 231 Cal. App. 3d 1089, 1095 (1991); see also Kinner v. World
7 Savings & Loan Ass'n, 57 Cal. App. 3d 724, 732 (1976) (holding no
8 duty of care owed by lender to borrower to ensure adequacy of
9 construction loan); Wagner v. Benson, 101 Cal. App. 3d 27, 35
10 (1980) (finding no duty owed by lender to borrower where lender is
11 not involved extensively in borrower's business). Plaintiffs have
12 not plead facts to show that Defendants exceeded their traditional
13 roles.

14 Moreover, Plaintiffs' negligence claims are merely
15 reassertions of their TILA and RFDCPA claims. They allege that
16 Defendants negligently violated these statutes. However, as noted
17 above, Plaintiffs' claims under TILA and RFDCPA are invalid.
18 Therefore, Plaintiffs' negligence claims based on violations of
19 these statutes also fail.

20 VIII. Civil Conspiracy

21 Civil conspiracy "is not a cause of action, but a legal
22 doctrine that imposes liability on persons who, although not
23 actually committing a tort themselves, share with the immediate
24 tortfeasors a common plan or design in its perpetration." Applied
25 Equipment Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510
26 (1994) (citing Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 784
27 (1979)). "Standing alone, a conspiracy does no harm and engenders

1 no tort liability. It must be activated by the commission of an
2 actual tort." Applied Equipment Corp., 7 Cal. 4th at 511. "The
3 elements of an action for civil conspiracy are (1) formation and
4 operation of the conspiracy and (2) damage resulting to plaintiff
5 (3) from a wrongful act done in furtherance of the common design."
6 Rusheen v. Cohen, 37 Cal. 4th 1048, 1062 (2006) (citing Doctors'
7 Co. v. Superior Court, 49 Cal. 3d 39, 44 (1989))

8 Here, Plaintiffs have not stated a cause of action on which
9 conspiratorial liability could be based. Even if they had,
10 Plaintiffs have not plead facts to show the formation and operation
11 of a conspiracy. Id. Plaintiffs' recitation of the elements of
12 civil conspiracy is not sufficient to allege this theory of
13 liability.

14 Accordingly, Plaintiffs' civil conspiracy claim is dismissed.

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CONCLUSION

For the foregoing reasons, the Court grants Defendants' motions to dismiss. Docket Nos. 21, 24. Plaintiffs may file an amended complaint within fourteen days from the date of this Order if they can truthfully make allegations which correct the inadequacies of their 1AC. If Plaintiffs do not file an amended complaint, their case will be dismissed for failure to prosecute. If an amended complaint is filed, Defendants may file a motion to dismiss within fourteen days thereafter. Plaintiffs' opposition will be due two weeks later and Defendants' reply will be due one week thereafter. The matter will be taken under submission on the papers. The case management conference scheduled for Tuesday, June 29, 2010 is vacated and rescheduled to September 7, 2010 at 2:00 p.m.

Dated: 06/24/10



CLAUDIA WILKEN
United States District Judge